STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2007
v	No. 271806 Oakland Circuit Court
DIRIK EUGENE ALLEN, Defendant-Appellant.	LC No. 2005-202837-FH

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v) and sentenced as an habitual offender, second offense, MCL 769.10, to probation for 18 months, with 120 days to be served in jail. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, along with Darlene Munson and another individual, were present in a bedroom when the police executed a search warrant at the residence. The police did not find any evidence on these individuals, but found a corner of a sandwich baggie (a "corner tie") that appeared to have cocaine residue on the floor underneath defendant. The police also found three crack pipes, a razor blade, and a rock of cocaine in an ashtray under the bed, approximately a foot from the "corner tie." The police also discovered a rock of crack cocaine on the bed in the area where Munson had been sitting and cocaine on the nightstand.

Defendant argues that the trial court erred by failing to require the prosecution to exercise due diligence to produce Munson for trial and by failing to instruct the jury that it could infer that her testimony would have been unfavorable to the prosecution. Defendant raised these issues both at trial and in a motion for a new trial.

The prosecution listed Munson as a res gestae witness pursuant to MCL 767.40a(1), but not a trial witness pursuant to MCL 767.40a(3). Contrary to defendant's argument, the "due diligence" standard for excusing the prosecution from producing a res gestae witness is no longer applicable.

> Before the amendment of MCL 767.40a; MSA 28.980(1), the prosecutor was required to exercise due diligence to produce an individual who might have any knowledge of the crime. The amendment of MCL 767.40a; MSA 28.980(1),

> 1986 PA 46, imposes a continuing duty on the prosecutor to advise the defense of all res gestae witnesses that the prosecutor intends to produce at trial. Put in other terms, the prosecutor's duty to produce res gestae witnesses was replaced with the duty to provide notice of known witnesses and to give reasonable assistance in the locating of witnesses if a defendant requests such assistance. [*People v Snider,* 239 Mich App 393, 423; 608 NW2d 502 (2000), lv den 463 Mich 855 (2000), citing *People v Burwick*, 450 Mich 281, 290-291; 537 NW2d 813 (1995).]

Here, the trial court determined that the prosecution provided reasonable assistance to the defense to find the witness, and defendant does not challenge that determination on appeal. Under the circumstances, then, defendant was not entitled to the "missing witness" instruction.

Defendant next argues that his trial counsel was ineffective because he informed the jury that Munson had pleaded guilty.

To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma,* 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate that counsel's deficient performance "was so prejudicial to him that he was denied a fair trial." *Id*.

Informing the jury that Munson had been convicted of possession of narcotics was part of the defense strategy of arguing that she, not defendant, possessed the narcotics that were found in the bedroom. This strategy was articulated by defense counsel in response to the prosecution's attempt to prevent the introduction of evidence to support the argument. That the strategy was not successful does not demonstrate that defense counsel was ineffective for using it. *People v Kevorkian,* 248 Mich App 373, 414-415; 639 NW2d 291 (2001), lv den 465 Mich 973, cert den 537 US 881; 123 S Ct 90; 154 L Ed 2d 137 (2002).

Finally, defendant contends that his constitutional right to due process was violated when the prosecutor commented during rebuttal argument on defendant's failure to testify by arguing, "And as I stated, he's putting the prosecutor and the police on trial while his client sits over there."

Generally, we review de novo a claim of prosecutorial misconduct and examine the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Abraham,* 256 Mich App 265, 272; 662 NW2d 836 (2003), lv den 471 Mich 916 (2004); *People v Aldrich,* 246 Mich App 101, 110; 631 NW2d 67 (2001), lv den 465 Mich 952 (2002). Preserved nonstructural constitutional error requires reversal unless the beneficiary of the error can prove it was harmless beyond a reasonable doubt. *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

The prosecutor may not comment on a defendant's failure to testify or decision to exercise his or her constitutional right to remain silent. *People v Fields,* 450 Mich 94, 108-109; 538 NW2d 356 (1995). Assuming arguendo that the reference to defendant "sit[ting] over there," was capable of being interpreted as suggesting that defendant had an obligation to do something more, such as testifying, any prejudice was cured by the trial court's immediate

cautionary instruction informing the jury that defendant has the right not to testify and that the jury could not draw any inferences from defendant's right to remain silent. The court gave a similar instruction in its final instructions. In light of the trial court's instructions, the error, if any, was harmless beyond a reasonable doubt.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto